

B. JANAKIRAMAIAH CHETTY  
v.  
A.K. PARTHASARTHI AND ORS.

APRIL 3, 2003

[SHIVARAJ V. PATIL AND ARIJIT PASAYAT, JJ.]

*Civil Procedure Code, 1908:*

*Order IX and Order XVII, Rule 2 and Explanation thereunder:*

*Suit—Hearing of—Absence of Party/Parties—Effect of—Held, Court has been conferred with discretionary power which is permissive and not mandatory to be exercised in the circumstances mentioned therein—When evidence/substantial portion of evidence has been recorded earlier, the Court may dispose of the matter as if party was present/deemed to be present.*

*Order XVII Rules 2 and 3:*

*Suit—Hearing of—Absence of Party/parties— Applicability of— Distinction between—Rule 2 and Rule 3—Discussed.*

*Words & Phrases:*

*'Where the evidence or substantial portion of the evidence of a party'— Meaning of in the context of Explanation to Rule 2 Order XVII C. P. C., 1908.*

The main issue which arose in the instant case pertains to the scope and ambit of Explanation to Order XVII Rule 2 of the Civil Procedure Code, 1908.

It was contended for the appellant that the High Court did not take into consideration the situational distinction between Order XVII Rule 2 and the Explanation to Rule 2; and that in view of the explanation the case could not have been proceeded ex-parte.

Dismissing the appeals, the Court

HELD: 1. 1. Explanation to Rule 2 Order XVII C. P. C. permits the

A Court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the Court has to be exercised in given circumstances. For application of the provision, the Court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the Court to adopt any of the modes provided in Order IX or to make such order as it thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the Rule, conferring discretion on the Court to act under specified circumstance. The crucial words in the Explanation are 'proceed with the case'. Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the Court or not.

[373-F-G; 374-B]

D

1.2. Under Order IX Rule 3 the Court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. [374-A]

E

1.3. Under Order XVII Rule 3(b), the only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the Court to proceed under rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Combined effect of Explanation to Rule 2 and Rule 3 is that a discretion is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present. [374-C-D-E-F]

F

G

1.4. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that *prima facie* is the position.

H

The Court has to be satisfied on the facts of each case about this requisite aspect. It would also be imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led or applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision. This clearly has imprints of an ex parte adjudication and not of a decision on merits. There is not even any indication as to what evidence was evaluated and/or whether the merits were tested. However, in the absence of any indication as regards merits of the case, preferring an appeal will be really inconsequential. It is more so when no definite ground of appeal can be pressed into service, except making generalized challenges. It certainly cannot be the legislative intent.

[374-G-H; 375-A; 376-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2690-2691 of 2003.

From the Judgment and Order dated 8.11.2001 of the Andhra Pradesh High Court in C.R.P. No. 3277 and 3472 of 2001.

L. Nageshwara Rao, G. Ramakrishna Prasad, K.C. Sudarshan, Jayanth Muthi Raj and Md. Wasay Khan, for the Appellant.

S. Nanda Kumar, Sivaraj for Rakesh K. Sharma, for the Respondents.

The Judgment of the Court was delivered by

**ARIJIT PASAYAT, J.** Leave granted.

The scope and ambit of Explanation to Order XVII Rule 2 of the Code of Civil Procedure, 1908 (in short 'the Code') falls for determination in these appeals.

As the issues are primarily legal, detailed reference to the factual aspects would be unnecessary. Factual background in a nutshell is as follows:

Alleging that the appellant, a leading businessman, was subject to torture by various police officials (the respondent herein), a writ petition was filed before the Andhra Pradesh High Court by appellant's son who alleged that he had no knowledge about the whereabouts of his father; who was tortured

A by police officials. The writ petition was disposed of by the High Court granting liberty to the petitioner to take such legal steps against the respondents for his alleged wrongful confinement. The suit O.S. No. 117/1992 was filed before the subordinate Judge, Chittoor claiming damages, on 15.4.1992. Written statement was filed on 12.4.1993. On 8.7.1997 the evidence on the petitioner's side was closed. On 15.11.1998 the evidence on behalf of the respondents was also closed and the matter was posted for arguments. In the meantime, applications were filed by respondents for adducing additional evidence. Those were posted for filing counter affidavits and hearing. On 23. 6.1999 the original suit was called for final hearing. As the respondents were not represented, a decree was passed. Applications were filed under C Order IX Rule 13 of the Code by the respondents for setting aside the decree and order dated 23.6.1999. Their stand was that they were engaged in official duty and were unable to attend the Court. Petitioner took the stand about non-applicability of Order IX Rule 13 of the Code to the facts of the case. On the ground that the matter was decided on merits and not *ex parte*. The stand was rejected and the application were allowed. D Aggrieved by the order passed by the Senior Civil Judge (as the Subordinate Judge is now presently described), two revision petitions were filed before the Andhra Pradesh High Court and by the impugned order it dismissed the two civil revision petitions.

E In support of the appeals, learned counsel for the appellant submitted that the situational distinction between Order XVII Rule 2 and the Explanation to Rule 2 has not been kept in view by the high Court. It was highlighted that the Explanation applies to a case where the Court proceeds to deal with a matter as if the parties are present. Order IX Rule 13 is applicable to a case where it has proceeded *ex-parte*. If the Explanation is applied, then, the case cannot be treated to be one which has proceeded *ex-parte* and, therefore, F application of Order IX Rule 13 is ruled out.

G Per contra, learned counsel for the respondents has submitted that the Subordinate Judge and the High Court have rightly taken note of the fact that the matter was proceeded *ex-parte* in the absence of the respondents and, therefore, order IX Rule 13 is clearly applicable.

Since the controversy revolves round Order XVII Rule 2 including its Explanation, the same is quoted below, along with Rule 3 thereof, since it has relevance:

H "Order XVII Rule 2: Procedure if parties fail to appear on day fixed-

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such order as it thinks fit.

*Explanation:* Where the evidence of a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned the Court may, in its discretion, proceed with the case as if such party were present.

*Rule 3:* Court may proceed notwithstanding either party fails to produce evidence etc. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, -

- (a) if the parties are present, proceed to decide the suit forthwith: or
- (b) if the parties are, or any of them is, absent, proceed under Rule 2.”

In order to determine whether the remedy under Order IX is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule. 2.

The Explanation permit, the Court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the Court to be exercised in a given circumstances. For application of the provision, the Court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the Court to adopt any of the modes provided in Order IX or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the Rule, conferring discretion on the Court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any

A party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the Court may in its discretion deem as if such party was present. Under Order IX Rule 3 the Court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6, and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are 'proceed with the case'. Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the Court or not.

In Rule 2, the expression used is "make such order as it deems fit", as an alternative to adopting one of the modes directed in that behalf by Order IX. Under Order XVII Rule 3(b), only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes. Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two Rules. However, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that *prima facie* is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the

Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led or applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision. A

In an instant case, the judgment of the Court was in the following terms: B

“Suit for recovery of a sum of Rs. 10,00,000 being the damages caused on account of arrest and detention illegally by the defendants on 18.4.1989 and for costs. C

After filing of written statement by the defendant the following issues were settled for trial:

1. Whether on 18.4.1989 at 10.00 a.m. the 1st defendant and his staff whisked away the plaintiff in a high handed manner, while he was in his shop? D
2. Whether the plaintiff was tortured by 1st and 2nd defendants?
3. Whether the learned Advocate Commissioner Chittoor found the plaintiff in Bhagayam P.S. ? E
4. Whether 1st defendant denied the quality of changes and courts of A.P. ?
5. Whether the plaintiff is entitled for damages as prayed for? F
6. To what relief? F

Additional issues reframed on 1.12.1977:

1. Whether this Court has no jurisdiction to try this suit?
2. To what relief? G

D. 1 to D. 3 called absent. No representation for the defendants. Suit is decreed with costs, together with interest at 6% per annum from the date of suit till realization. ”

This clearly has imprints of an ex-parte adjudication and not of a H

A decision on merits. There is not even any indication as to what evidence was evaluated and/or whether the merits were tested.

B The matter can be looked at from another angle. In the absence of any indication as regards merits of the case, preferring an appeal will be really inconsequential. It is more so when no definite ground of appeal can be pressed into service, except making generalized challenges. It certainly cannot be the legislative intent.

We find no infirmity in the impugned judgment to warrant interference. The appeals are dismissed but with no order as to costs.

C S.K.S.

Appeals dismissed.